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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 786

JOSEPH NICOLETTI

vs.

UNITED STATES

Petition
For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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Opinion of Appeals Court Appended.

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Petition
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I.

The Opinions of the Courts Below.

The opinion of the Court of Appeals has not yet been reported. A copy has been here appended. The opinion in *United States* v. *Accardo* is reported in 298 F. 2nd 133.

II.

Jurisdiction.

The date of the judgment to be reviewed is November 23, 1962. Our Petition for Rehearing was denied January 4, 1963. Jurisdiction to issue the writ is found in §. 240 of the Judicial Code as amended, 28 U.S.C.A. § 1254.

Questions Presented.

1. A witness for the defendant in 1960 testified to a fact concerning meeting and dealing with the defendant during 1956, 1957 and 1958. When confronted on cross examination with an impeaching oral statement, made to F.B.I. agents in 1959, he said he did not recall the visit or the making of the contradictory statement. Did the court err in refusing an instruction based upon the two witness rule?

2. By instruction, the Court took the question of materiality from the jury. On this subject the government introduced only the indictment against the main defendant; the indictment does not show materiality. Did not the Court err in not requiring proof of the evidence, or sufficient to show as a matter of fact that the witness pretended to not recall a contradictory statement concerning a material fact?

3. After a claim was made in the Appeals Court that no evidence was before the District Court to show materiality, was it not error for the Appeals Court to go out of the record to consider proof not before the District Court?

4. The perjury is alleged to have been committed in the first of two trials of the main defendant. The second trial, had after the conviction of the witness, resulted in an acquittal of the main defendant. Was it not error for the Court of Appeals to refuse to consider the effect of the acquittal and to deny leave for the witness to move for a new trial?

PETITION

To the Honorable Earl Warren, Chief Justice of the United States and Associates Justices of the Supreme Court of the United States.

May it please the court:

The petition of Joseph Nicoletti shows to this Honorable Court:

Summary Statement of Matter Involved.

Your petitioner was called as a witness in 1960 on behalf of the defense in the first Accardo trial. He was convicted in 1961 of perjury, because he said he did not recall having been interviewed by two federal agents. The prosecutor confronted him with a contradictory oral statement on cross examination. Accardo was tried twice. The first trial resulted in a conviction which was reversed in 1962. The second trial resulted in an acquittal. Petitioner was tried before the reversal and before the acquittal. His case was briefed and argued in the Court of Appeals prior to the acquittal of Accardo. On Petition for Rehearing, petitioner requested consideration of the legal effect of the acquittal. Also petitioner requested leave to move in the District Court for new trial. Relief was denied.

We quote from the opinion by Judge Major, herein p. App. 2:

> "The indictment charged * * * that during the course of the trial it became material for the Court and jury to learn whether the said Accardo had performed any services for Premium Beer Sales, Inc., during the years 1956, 1957 and 1958."

In a footnote Judge Major said:

> "Accardo was charged with false statements in his income tax returns in claiming deductions for certain automobile expenses incurred by him as an agent for Premium Beer Sales, Inc. From a judgment of

conviction Accardo appealed to this Court. *United States* v. *Accardo*, 298 F. 2d 133."

Judge Major further said:

"Defendant urges as grounds for reversal that the Court erred (1) in its denial of defendant's motion to dismiss the indictment for failure to state an offense; (2) in its denial of defendant's motion for a judgment of acquittal because of the insufficiency of proof; (3) in findings that the alleged false testimony was material, and (4) in failing to charge the jury properly as to quantum of proof necessary to convict."

As to (3) above, Judge Major said:

"Obviously, the essential purpose of his testimony was to bolster the contention of the defense that Accardo during the years in question was, as claimed in his return, an agent of Premium, engaged in selling its beer and, therefore, entitled to deduct automobile expenses incurred in such employment. It is evident that such testimony was material to the issue being tried. * * * Other testimony showed that Accardo did not sell any beer to defendant during the tax years involved in Accardo's trial or any other time."

It is contended that the District Judge did not have enough of the evidence from the first Accardo trial before him to conclude one way or another on the question of materiality. Judge Major obviously consulted the record in 298 F. 2d 133. The government failed to request the District Judge to do this.

As to (4) above, Judge Major said:

"The Court's charge contained no reference to the so-called two witness rule generally recognized in perjury cases. If this rule is applicable, the Court's refusal to so instruct the jury is reversible error or, to state it another way, the evidence is not sufficient to support the verdict."

It is contended that the Court of Appeals erred in concluding that the rule is not applicable.

Reasons for Granting the Writ.

1. The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

2. An exercise of this Court's power of supervision is required.

Summary of Argument.

The District Court Erred in Finding that the Alleged False Testimony was Material.

Judge Perry did not have enough of the evidence from the Accardo case before him to make any decision as to materiality.

Judge Major obviously examined the record of the evidence introduced in the first Accardo trial. The conclusions drawn collide with the facts but petitioner has had no opportunity to contest this point.

The Court of Appeals erred in refusing to grant leave to move for new trial in order that the District Court might reconsider in the light of the reversal and the not guilty.

The Court Failed to Charge the Jury Properly under the Two Witness Rule.

We quote from *Weiler* v. *United States*, 323 U.S. 606, 607:

> "The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries. That it renders successful perjury prosecution more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result."

We respectfully submit that the cases cited by Judge Major in qualification of the rule are easily distinguished and that it was error to not follow *Weiler* v. *United States*, 323 U.S. 606, 607.

ARGUMENT.

The District Court Erred in Finding that the Alleged False Testimony was Material.

In *Blackmon* v. *United States*, 108 F. 2nd 572, the District Judge at the request of the defendant submitted the question of materiality to the jury. The Court of Appeals said: (p. 573)

> "The materiality required is not as to any particular issue in the case, but as to the trial as a whole, that is, materiality is determined by whether the false testimony was capable of influencing the tribunal on the issue before it."

In *Bilderbach* v. *United States*, 249 F. 2nd 271, 274, Judge Rives said:

> "The record upon the former trial was introduced before the court to enable it to decide as a question of law, the materiality of the alleged prejury. Correctly, we think, the court decided that the alleged perjured evidence was material."

So it appears that Bilderback had two opportunities to secure a determination of his point that the false testimony was not on a material point.

(a) Before the District Court on the former record

(b) Before the Court of Appeals in review of the former record. In the case at bar, Nicoletti was deprived of

(a) because the Government neglected to introduce the record of the former trial.

As to (b), we quote from our brief filed in the Court of Appeals p. 20:

"On the evidence introduced in this cause it is represented that the Trial Court erred in its finding that the testimony given by the defendant in the Accardo trial, 60 Cr 189, was material to the issues therein. No evidence was introduced to establish materiality except perhaps the indictment, Government's Exhibit 1 in Case No. 60 Cr. 189. That document merely states in each of its three counts that the defendant Accardo caused to be filed with the Internal Revenue Service a document which states in separate counts for the year 1956, 1957 and 1958 that he was employed by Premium Beer Sales, Inc. and had used his automobile in promoting sales and that his deductions for the expense of operating his automobile were not incurred by him for that purpose.

"It is not alleged that the defendant Accardo in 60 CR 189 was not a salesman for Premium Beer Sales, Inc. but only that he overstated his automobile expenses. It is well-settled that in order to constitute perjury it is necessary that the false testimony be material to an issue or point of inquiry.

"The indictment in the case at bar charged in paragraph three (App. 4) that during the course of the Accardo trial it became material to learn whether he had performed any services for Premium Beer Sales, Inc. during the years 1956, 1957 and 1958 and further, it was material to learn whether or not certain witnesses who testified on behalf of Accardo had previously made statements to agents of the Federal Government which was inconsistent with their testimony in the said case.

"Nowhere in the Record in this case is there any evidence upon which the Court could sustain its finding as to the materiality of the defendant's testimony in the Accardo trial. The Court cannot surmise, guess or conjecture on the materiality of the testi-

mony but must make its finding on the evidence presented before it. *Brooks* v. *United States,* 253 F. 2d 362, 364.

> "'The burden was upon the Government to show that appellants' testimony was material to the matter under investigation, *Blackmon* v. *United States,* 5 Cir. 1940, 108 F. 2d 572.'"

See also *Luse* v. *United States,* 49 F. 2d 241, and *Harrell* v. *United States,* 220 F. 2d 516. Here the prosecution rested its case on only the testimony of the defendant himself and this was not sufficient to establish the question of its materiality.

We quote from the brief of the United States Attorney, p. 29:

> "The defendant alleges on page 20 of his brief that the indictment in *U. S.* v. *Accardo* 60 CR 189, did not allege that Accardo was not a salesman for Premium Beer Sales, Inc., but only that he over-stated his expenses. The defendant then argues that if his testimony was false testimony, that it must have been material to an issue or point of inquiry in the Accardo trial and that it was not.
>
> The indictment in *U.S.* v. *Accardo* charged that Accardo * * * on or about March 20, 1957 * * * did unlawfully, wilfully and knowingly make, and subscribe a document, which contained a written declaration * * * which said defendant did not believe to be true and correct * * * that * * * Accardo * * * about March 20, 1957 made, subscribed, and filed * * * a document, to-wit, 1956 U.S. Individual Income Tax Return * * * in which * * * defendant stated in substance, that during the tax years 1956 he was employed by Premium Beer Sales * * * and paid the sum of $42,862.25, * * * that while so employed 80 percent of the automobile expenses involved in the operation of a certain Mercedes Benz automobile were incurred by

> him in promoting beer sales for * * * Premium * * * whereas * * * defendant then and there well knew that this statement was not true and correct in that 80 percent of the said automobile expenses were not incurred by him in promoting beer sales for Premium * * * in violation of Section 7206(1), * * *" *U.S.* v. *Accardo*, 7 Cir., 298 F. 2d 133, 134 (ft. 2)

The opinions of this Court as found in *U.S.* v. *Accardo*, reflect the theory of the case below and the proof adduced. Here follows quotations from 298 F. 2nd 133 decided in 1962. We quote further, p. 32:

> "Thus, in *U.S.* v. *Accardo* the thrust of Nicoletti's testimony was to support Accardo's contention that he was a beer salesman for Premium Beer Sales, that he used his car in the course of such employment, and therefore, giving rise to the inescapable conclusion on Accardo's part that he was entitled to deduct depreciation for the use thereof."

The (1) "thrust of Nicoletti's testimony" and (2) "Accardo's contention that he was a beer salesman" might be questioned now at this late day, if Your Honors consider the "proof adduced." But the "proof adduced" was not shown to Judge Perry.

We quote from the opinion by Judge Major, herein p. App. 9:

> "The testimony of the agents as to their interview with defendant contradicted defendant's testimony given at the Accardo trial. Other testimony showed that Accardo did not sell any beer to defendant during the tax years involved in Accardo's trial or at any other time."

In order to arrive at this conclusion, Judge Major must have examined the record of the evidence introduced in the first Accardo trial. Petitioner by reason of the fact that this evidence was not introduced before Judge Perry was

deprived of the chance to argue (a) that there was no such "other testimony" and it would have been on an immaterial issue.

Failure on the part of the prosecutor to introduce the Accardo evidence before Judge Perry deprived Nicoletti of the opportunity to argue that (1) and (2) above were on immaterial matters.

We quote from *Bridges* v. *United States*, 199 F. 2nd 811, 833. See 62 A.L.R. 2nd 1036.

> "Once it was determined what took place, the materiality of such facts to the issue was for the court alone."

Judge Perry could not determine what took place from the indictment alone.

We quote from our Petition for Rehearing:

> "The first Accardo trial was prosecuted on the theory that his returns were fraudulent; that he never sold beer. Under such theory, the testimony of Nicoletti may have been material. Because of the opinion of Your Honors in the *Accardo* case, the Government was compelled to change its theory in the second trial."

Whether or not our point had any merit would require consideration of the entire record. We sought to find relief in a motion for leave to file a motion for new trial. This was denied. This denial we respectfully submit calls for the supervisory powers of this Honorable Court.

In support of our motion for leave to file a motion for a new trial, we suggested the following:

1. A witness for the defendant in 1960 testified to a fact concerning meeting and dealing with the defendant during 1956, 1957 and 1958. When confronted on cross examination with an impeaching oral statement, made

to F.B.I. agents in 1959, he said he did not recall the visit or the making of the contradictory statement. Did the court err in refusing an instruction based upon the two witness rule?

2. By instruction the Court took the question of materiality from the jury. On this subject the government introduced only the indictment against the main defendant. Did not the Court err in not requiring proof of the evidence, or sufficient to show as a matter of fact that the witness pretended to not recall a contradictory statement concerning a material fact?

3. The perjury is alleged to have been committed in the first of two trials of the main defendant. The second trial, had after the conviction of the witness, resulted in an acquittal of the main defendant. Was it not error for the Court of Appeals to refuse to consider the effect of the acquittal and to deny leave for the witness to move for a new trial?

In *Ehrlich* v. *United States*, 145 F. 2d 693 it was held that the acquittal of the defendant bars a subsequent prosecution for perjury with reference to an act necessarily determined by the verdict.

Prayer for Writ.

Wherefore Your petitioner prays that a writ of certiorari be issued directed to U.S.C.A. for the Seventh Circuit and such further relief as may seem just.

JOSEPH NICOLLETTI
Petitioner

RICHARD GORMAN
WM. SCOTT STEWART
Counsel for Petitioner

APPENDIX.

In the

United States Court of Appeals

For the Seventh Circuit

No. 13722 SEPTEMBER TERM AND SESSION, 1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH NICOLETTI,
Defendant-Appellant.

Appeal from the United Stated District Court for the Northern District of Illinois, Eastern Division.

November 23, 1962

Before HASTINGS, *Chief Judge*, CASTLE and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* The defendant was by verdict of a jury convicted of the crime of perjury, in violation of Title 18 U. S. C. Sec. 1621. From a judgment entered thereon, defendant appeals.

The indictment charged that Joseph Nicoletti on the 24th of October, 1960, was called as a witness on behalf of the defendant in *United States of America* v. *Anthony Joseph Accardo*, who was being tried before Honorable Julius J. Hoffman in the United States District Court for the Northern District of Illinois, Eastern Division, and that

during the course of the trial it became material for the Court and jury to learn whether the said Accardo had performed any services for Premium Beer Sales, Inc., during the years 1956, 1957 and 1958.[1]

The indictment also charged:

"(a) On October 24, 1960, the defendant Nicoletti testified in substance that he did not recall being interviewed by two agents of the Federal Bureau of Investigation during the year 1959, and, more particularly, that he did not recall being interviewed by two agents of the Federal Bureau of Investigation on May 26, 1959.

"The said testimony was false, as the defendant then and there well knew, in that he did recall and well knew that he had been interviewed by two agents of the Federal Bureau of Investigation in the year 1959, and, more particularly, that this interview took place on May 26, 1959.

"(b) On October 24, 1960, the defendant Nicoletti further testified in substance that during the aforesaid interview he did not make the following statements to two agents of the Federal Bureau of Investigation:

"1. That he went to high school with Bob Ord, a former official of Fox Head and took Fox Head 400 Beer only as a favor to Ord:

"2. That he was not acquainted with Jack Cerone, Anthony Accardo or Joseph Gagliano, and had had no dealings with these individuals.

"The said testimony was false, as the defendant then and there well knew, in that he had made each of the aforesaid statements to agents Inserra and

[1] Accardo was charged with false statements in his income tax returns in claiming deductions for certain automobile expenses incurred by him as an agent for Premium Beer Sales, Inc. From a judgment of conviction, Accardo appealed to this Court. **United States v. Accardo**, 298 F. 2d 133.

Frankfurt of the Federal Bureau of Investigation on May 26, 1959 at Nicoletti's Restaurant, 5658 West Madison Street, Chicago, Illinois.

"7. Therefore, on the occasion aforesaid, the defendant Nicoletti did willfully, knowingly and contrary to the oath above described, state material matters which he did not believe to be true, and was then and there guilty of perjury, in violation of Title 18, United States Code, Section 1621."

Defendant urges as grounds for reversal that the Court erred (1) in its denial of defendant's motion to dismiss the indictment for failure to state an offense; (2) in its denial of defendant's motion for a judgment of acquittal because of the insufficiency of proof; (3) in finding that the alleged false testimony was material, and (4) in failing to charge the jury properly as to the quantum of proof necessary to convict.

Defendant contends that the indictment was insufficient because of its vagueness and indefiniteness; that it set forth only the substance of the alleged perjurious testimony, when it should have been set forth in haec verba, and that the allegations are not sufficient to support a plea of double jeopardy upon conviction or acquittal.

We think there is no merit in the attack upon the indictment. It plainly alleges all of the elements essential to constitute the crime of perjury as defined by the statute. Any doubt in this respect is resolved by the discussion and holding in *United States* v. *Debrow*, 346 U. S. 374

Defendant's contention that the evidence was not sufficient to sustain a guilty verdict and that the Court erred in failing to charge the jury as to the quantum of proof necessary to convict are so closely related that they may appropriately be discussed together. The latter conten-

tion is based upon the Court's refusal to give an instruction tendered by the defendant which in part stated:

> "It is sufficient to convict the defendant if it appears from the evidence, beyond a reasonable doubt, by the testimony of two witnesses, or from the testimony of one witness and such corroborative circumstances as in your opinion is equivalent to the testimony of two witnesses, that the defendant did wilfully and corruptly testify falsely as to some material matter in the judicial proceedings as alleged in the indictment."

The Court's charge contained no reference to the so-called two witness rule generally recognized in perjury cases. If this rule is applicable, the Court's refusal to so instruct the jury is reversible error or, to state it another way, the evidence is not sufficient to support the verdict.

We understand the Government on brief so recognizes. Referring to defendant's alleged false testimony that he did not remember the interview with the two agents of the F. B. I., as alleged in the indictment, the Government states, "In this regard the Government relies on circumstantial evidence, since, as has been pointed out in several cases, proof of recollection cannot be shown by direct evidence, but must be shown by circumstantial evidence. Hence, the two witness rule does not apply."

In this connection it is essential to keep in mind the precise issue for decision. The Court, without objection, instructed the jury:

> "The issue to be determined by you is whether or not the defendant willfully and knowingly spoke falsely in his testimony given on October 24, 1960 when he said he did not recall the interview."

Defendant on brief states, "* * * the issue which was to be tried was not whether the interview by the two agents on May 26, 1959 took place as alleged, but whether or not

the defendant was telling the truth, as he swore to do in his testimony on October 24, 1960, when he stated that he did not remember the interview."

Defendant in support of his contention that the Court erred in its refusal to charge the jury as to the quantum of proof necessary to convict relies upon *Weiler* v. *United States*, 323 U. S. 606, in which the Court cited with approval its previous holding in *Hammer* v. *United States*, 271 U. S. 620, 626, held that the trial court committed error in its refusal to instruct the jury as to the applicability of the so-called two witness rule and reversed the judgment.

Of the numerous cases wherein the quantum of proof required in a perjury case has been considered, it is pertinent to note the recent decision of this Court in *United States* v. *Main*, 280 F. 2d 74. In an opinion by Judge Duffy, the Court stated (page 76):

> "The degree and character of proof required in a perjury prosecution is different than in an ordinary criminal case. It is clear that there are two essential elements of proof. First, the statements made by the defendant must be proven false. Secondly, it must be proven that the defendant did not believe these statements to be true. It is clear that the objective falsity of the statements made must be established in conformity with the 'two witness rule' which is peculiar to perjury prosecutions."

The issue in that case was whether the two witness rule was applicable to the second element, that is, that the defendant did not believe his alleged perjurous statements to be true. The Court, after citing and discussing numerous cases, including *American Communications Assn., C. I. O.* v. *Douds*, 339 U. S. 382, stated (page 78):

> "It is quite clear that in the Douds case, the Supreme Court was not extending the two witness rule to the second element in perjury. The confusion arises from

> the fact that in such a case, the false statement itself is a statement of what the witness believed. In the ordinary perjury prosecution, such as the case at bar, the false statement is not a statement of belief, but rather, a false statement of some objective fact. Thus, in the case at bar, the element of belief enters into the case only in proving the second element of perjury which was that the defendant knew when he made the statement that it was not true."

The Court on the same page, in response to defendant's argument that circumstantial evidence could not be relied upon to establish intent and belief, stated:

> "We think, however, that strong and convincing circumstantial evidence may prove the intent to falsify just as circumstantial evidence can be used in other criminal cases to establish guilt of an accused beyond a reasonable doubt."

In Magin, the testimony alleged to be perjurous was in substance that the defendant was not interested in and had never had any business connection with certain named individuals. As noted, the Court held that the falsity of this statement was capable of proof by direct testimony and that the two witness rule was, therefore, applicable. The Court further held that the defendant's belief that the statements were not true could be proven by circumstantial evidence. In all of the cases, so far as we are aware, which have held the two witness rule applicable, the falsity of the alleged perjurous testimony was capable of proof by direct evidence. In the instant case, the situation is different. Both elements of the offense, as set forth in Magin, relate to or involve defendant's state of mind, that is, it is alleged that defendant's testimony that he did not remember certain interviews was false, and that defendant did not believe such testimony to be true.

Courts have frequently approved a deviation from the two witness rule under the same or similar factual situations. *Behrle* v. *United States*, 100 F. 2d 714, 715-716; *United States* v. *Beach*, 296 F. 2d 153, 155; *United States* v. *Collins*, 272 F. 2d 650, 652; *Fotie* v. *United States*, 137 F. 2d 831, 842. The reasoning of such courts is aptly stated in Beach (page 155):

> "Obviously, where the perjury relates to the accused's state of mind, such as what he knew or saw or heard, proof can only be made by proof of facts from which the jury will infer that the accused *must* have known or seen or heard what he had denied knowing or seeing or hearing."

The Court in that case contnued by quoting from Behrle (page 715):

> " 'This is necessarily so because in the nature of things it is not possible for the prosecution to prove, except through circumstantial evidence, that the accused actually remembered the facts that he had formerly sworn to.' "

We hold that the nature of the alleged perjurous testimony was such that the so-called two witness rule was not applicable and that the refusal of the trial court to instruct the jury in this respect was not error. Conversely, we hold that the charge was susceptible of proof by circumstantial evidence sufficient to satisfy the jury of defendant's guilt beyond a reasonable doubt.

No good purpose could be served in relating or discussing in detail the circumstances in proof relied upon by the Government. Briefly, Accardo was charged with making false statements in his income tax returns for the years 1956, 1957 and 1958, by stating that during those years he was employed by Premium Beer Sales, and by claiming

deductions for expenses incurred in promoting sales as an agent for Perimum. On October 24, 1960, during the Accardo trial, defendant in the instant case testified as a defense witness. Obviously, the essential purpose of his testimony was to bolster the contention of the defense that Accardo during the years in question was, as claimed in his return, an agent of Premium, engaged in selling its beer and, therefore, entitled to deduct automobile expenses incurred in such employment. It is evident that such testimony was material to the issue being tried. In summary, the defendant testified that he had seen Accardo fifteen or twenty times during the three-year period involved; that Accardo came to defendant's place of business and had lunch; that in 1956, he gave Accardo an order for ten cases of Fox Head 400 beer and that at that time he saw Accardo's car. Defendant further testified that he had given Accardo orders for beer in late 1956 and in 1948 or 1949; that he had known Accardo for twelve or thirteen years, and that he had known Jack Cerone for fifteen years.

On cross-examination defendant testified, as charged in the indictment, that he did not recall being interviewed by two agents of the Federal Bureau of Investigation on May 26, 1959, and that he did not state to said agents that he took Fox Head beer only as a favor to Bob Ord and that he was not acquainted with Anthony Accardo or Jack Cerone.

Two F. B. I. agents testified that on May 26, 1959, they interviewed defendant at his place of business on Madison Street in Chicago. Defendant told them that he had previously carried Fox Head 400 beer but that it did not sell and he discontinued it several years before. Defendant told the agents that he had been introduced to Fox Head 400 beer by Bob Ord, a friend with whom he had gone to high school, and that he took the beer only as a favor to Ord.

Defendant told them he did not know Accardo and could not identify a photograph of Accardo which was shown him. The testimony of the agents as to their interview with defendant contradicted defendant's testimony given at the Accardo trial. Other testimony showed that Accardo did not sell any beer to defendant during the tax years involved in Accardo's trial or at any other time.

Defendant's memory was good as long as he was testifying in support of Accardo's defense but it suddenly failed when he was faced with cross-examination. At that time he was confronted with a two-pronged dilemma. If he admitted making the previous statement to the agents contradictory of his testimony in chief, the latter would be of no benefit to Accardo's defense. If he denied making the statement, he would be impeached by their testimony. Thus, it is plain that defendant's motive was to aid Accardo in the defense of his case.

It is our conclusion and we so hold that the proof was sufficient to justify the jury verdict. We have considered other errors urged by defendant and hold that they are without merit.

The judgment is

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 786

JOSEPH NICOLETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–9) is reported at 310 F. 2d 359.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1962. A petition for a rehearing was denied on January 4, 1963. The petition for a writ of certiorari was filed on February 2, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court in a perjury prosecution properly refused to instruct the jury that the falsity of petitioner's testimony that he did not recall an event must be proved by the two-witness rule, where petitioner did not dispute the fact that the event had actually occurred.

2. Whether the alleged perjurious statement was material.

3. Whether a witness who gave false testimony in a criminal trial is exonerated from the penalties of perjury by reason of the subsequent acquittal of the defendant.

STATUTE INVOLVED

18 U.S.C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged in the Northern District of Illinois with perjury in violation of 18 U.S.C. 1621. The indictment alleged that on October 24, 1960, petitioner testified as a defense witness under oath at

a trial of a criminal case in that district prosecuted by the United States against Anthony Joseph Accardo, and that it became material to learn whether Accardo had performed any services for Premium Beer Sales, Inc. during 1956, 1957, and 1958 and whether certain defense witnesses had previously made statements inconsistent with their trial testimony. The indictment further charged that petitioner wilfully testified falsely (1) that he did not recall being interviewed by two F.B.I. agents on May 26, 1959, and (2) that he did not disclose to the agents in the interview that he took Fox Head 400 Beer as a favor to Bob Ord and that he was not acquainted and never had any dealings with Anthony Accardo, Jack Cerone, or Joseph Gagliano (App. 4–5).[1]

Following a jury trial, petitioner was found guilty. He was sentenced to imprisonment for a period of eighteen months (App. 209).

1. The evidence may be summarized as follows: On October 24, 1960, petitioner appeared as a defense witness at the trial of Anthony Joseph Accardo (App. 22–23, 28–29). On direct examination, he testified that on October 1 or 2, 1956, Accardo came to his tavern on behalf of Premium Beer Sales and sold him 10 cases of Fox Head 400 Beer; that at that time he saw Accardo's automobile (which he identified at the trial from a photograph) parked in front of his tavern; that he gave Accardo another beer order in November 1956; and that he had seen Ac-

[1] "App." refers to the appellant's appendix in the court below.

cardo 15 or 20 times at his tavern during 1956, 1957, and 1958 (App. 29–34). On cross-examination petitioner stated that he did not recall any interview on May 26, 1959 with two F.B.I. agents, Vincent L. Inserra and Paul B. Frankfurt, at his place of business and that he did not recall telling these agents either that he purchased Fox Head beer as a favor to Bob Ord or that he was not acquainted with Accardo, Jack Cerone, or Joseph Gagliano (App. 44–47). Petitioner did remember an earlier 1954 or 1955 interview with F.B.I. agents concerning a tavern association (App. 46).

F.B.I. agents Inserra and Frankfurt testified that they did in fact interview petitioner. They related that petitioner told them he had purchased Fox Head beer from Bob Ord as a favor and that he was not acquainted with Accardo, Jack Cerone, and Joseph Gagliano. The agents testified that when they showed petitioner a picture of Accardo at the interview, he stated that he did not know the person in the photograph (App. 48–57, 139–141).[2]

2. The court, at the request of petitioner, instructed the jury as follows (App. 203–204):

> I instruct you the recollection of a witness must be shown by circumstantial evidence but it is not enough that the evidence raise an inference of guilt. In view of the requirement

[2] A sales report of Premium Beer Sales introduced into evidence shows that on March 16, 1956, Jack Cerone opened a new account at Nicoletti's restaurant covering the sale of 5 cases of Fox Head Beer (Ex. 4).

that proof of the defendant's recollection of the incident which he denies recollecting must establish the fact of his guilt beyond a reasonable doubt, something more is necessary to convict than proof that the act not remembered did occur.

I instruct you that whether you believe the defendant was or was not interviewed by Agents Inserra and Frankfurt on May 26, 1959 is not the issue here. The issue to be determined by you is whether or not the defendant willfully and knowingly spoke falsely in his testimony given on October 24, 1960 when he said he did not recall the interview.[3]

The court refused to give the following instruction on the two-witness rule (App. 165–166, 188–189, 207–208):

Before you can convict the defendant of wilful and corrupt perjury, as charged in the indictment, you must believe from the evidence, that the defendant, in the judicial proceedings alleged in the indictment, after being duly sworn to tell the truth, did wilfully and corruptly testify falsely to a matter material to the

[3] The first paragraph of the above instruction was given in the exact form requested by petitioner (App. 174–175, 193). The form of the second paragraph was modified by the court (App. 189–190). As originally submitted by petitioner it read (App. 166):

"I instruct you it is immaterial whether you believe the defendant was or was not interviewed by Agents Inserra and Frankfurt on May 26, 1959. The sole issue to be determined by you is whether or not the defendant wilfully and knowingly lied in his testimony given on October 24, 1960 when he said he did not recall the interview."

> issues there involved, in manner and form as alleged in the indictment. It is sufficient to convict the defendant if it appears from the evidence, beyond a reasonable doubt, by the testimony of two witnesses, or from the testimony of one witness and such corroborative circumstances as in your opinion is equivalent to the testimony of two witnesses that the defendant did wilfully and corruptly testify falsely as to some material matter in the judicial proceedings as alleged in the indictment.

ARGUMENT

1. Petitioner, at his own request, succeeded in having the trial court narrow the issue in the case to the question of whether petitioner testified falsely when he said that he did not recall his interview with the F.B.I. agents. Petitioner did not contest the fact that he had been interviewed by two F.B.I. agents on May 26, 1959. The only issue which he tendered was his recollection or lack of recollection of the interview. This issue, as to his state of mind, necessarily depended upon circumstantial evidence. Indeed petitioner *did not* in the district court contend otherwise. At his request, the trial judge instructed the jury that "the recollection of a witness must be shown by circumstantial evidence" (see *supra*, p. 4).

On this issue, there is no room for application of the "two witness" rule requiring proof by the "direct" testimony of two independent witnesses or by the "direct" testimony of one witness and corroborative circumstances. The rule applies to the proof of objective facts—whether an event did or did not occur. It has

no application to subjective facts—*i.e.*, the defendant's state of mind. Such facts, which are incapable of direct proof, must of necessity be proved otherwise. The difference was expressed in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 411: "* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does." Since in this case there was no dispute at all as the objective facts, there was no occasion for an instruction on the two-witness rule. Accord, *United States* v. *Beach*, 296 F. 2d 153 (C.A. 4); *Behrle* v. *United States*, 100 F. 2d 714 (C.A. D.C.); *Fotie* v. *United States*, 137 F. 2d 831 (C.A. 8).

2. Petitioner does not quarrel with the principle that the trial court should determine as a matter of law whether the false statements were material. His contention is that the portions of the Accardo record introduced into the evidence at the trial—the indictment and petitioner's testimony—were insufficient to show the materiality of his statements.

The indictment in the Accardo case charged that Accardo made and subscribed income tax returns for the years 1956, 1957, and 1958 which contained false statements in violation of Section 7206(1) of the Internal Revenue Code of 1954 in that he claimed automobile expenses in promoting beer sales as an employee of Premium Beer Sales, when in fact the automobile expenses were not incurred in that activity. The substance of petitioner's direct testimony on Accardo's behalf was that Accardo sold him beer dur-

ing those years and used his automobile in so doing. On cross-examination, petitioner could not recall an interview with F.B.I. agents in which he had made statements contradictory to this direct testimony. It was this testimony on cross-examination which was the basis of the perjury charge.

The central issue of the Accardo case, as charged in the indictment, was whether Accardo used his automobile in selling beer. The questions asked on cross-examination were plainly designed to impeach petitioner's testimony that Accardo had sold him beer and had on one occasion used his automobile for this purpose. They therefore plainly related to the central issue of the Accardo case. Since petitioner's "false testimony was capable of influencing the tribunal on the issue before it," it was material. *Blackmon* v. *United States*, 108 F. 2d 572, 573 (C.A. 5).

Petitioner's complaint on materiality seems to be that, in affirming the conviction, the court of appeals referred not only to the indictment and portions of the testimony before the trial judge, but to the entire record of the Accardo trial which had been before the court of appeals in *United States* v. *Accardo*, 298 F. 2d 133 (C.A. 7). However, as we have just shown, the indictment and petitioner's testimony alone showed materiality. Consequently, the trial judge was correct in holding that petitioner's false statements were material on the evidence before him. It is not significant therefore that the court of appeals found this con-

clusion supported by consideration of the whole record.

3. Petitioner also contends that the acquittal of Accardo on the second trial, at which petitioner did not testify, warrants a new trial. Deliberately false testimony on a material issue, however, is perjury, whatever the ultimate result of the trial itself. *United States* v. *Williams*, 341 U.S. 58.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] Petitioner suggests (Pet. 10) that the failure of the government to introduce the full record of the Accardo trial deprived petitioner of the opportunity to make certain arguments on the issue of materiality. However, if as we have shown the government adequately showed materiality, it was up to petitioner to introduce any evidence needed for his defense.